(12) (15)

Nos. 87-1589 and 87-1888

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the Railway Labor Act require that a railroad exhaust that Act's collective bargaining procedures prior to implementing a decision to go out of business?

2. Does the Interstate Commerce Act preempt any obligation that a railroad might otherwise have to exhaust Railway Labor Act collective bargaining procedures with respect to the effects of a decision to go out of business, where the Interstate Commerce Commission, which has exclusive jurisdiction to consider the interests of labor, has expressly declined to impose labor protective provisions as a condition to its authorization of the immediate consummation of a sale of the railroad's assets?

3. Are federal district courts deprived of jurisdiction by Section 4 of the Norris-LaGuardia Act to enjoin strikes by railroad unions designed to block railroad transactions approved by the Interstate Commerce Commission, where the unions participated in the administrative proceedings approving the transaction?

4. Does an order prohibiting a railroad that is operating at a loss from going out of business until it completes the "almost interminable" collective bargaining procedures of the Railway Labor Act violate the Fifth Amendment prohibition against the taking of property without just compensation?

LIST OF PARTIES

1. Petitioner is The Pittsburgh & Lake Erie Railroad Company, which is incorporated in Delaware with its principal place of business in Pennsylvania.

Pursuant to Supreme Court Rule 28.1, Petitioner lists the following entities as related parents, subsidiaries, affiliates, or companies in which it holds an interest:

Pleco, Inc.
The Montour Railroad Company
The Youngstown & Southern Railroad Company
The Pittsburgh, Chartiers and Youghiogheny Railroad Company
The Monongahela Railway Company

2. Respondent is Railway Labor Executives' Association, an unincorporated association of executive officers of nineteen labor unions whose members are:

American Railway & Airway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employees
Brotherhood of Railroad Signalmen
Brotherhood of Railway Carmen
Hotel Employees and Restaurant Employees International Union
International Association of Machinists and Aerospace Workers

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Seafarers' International Union of North America
Sheet Metal Workers International Association
Transport Workers Union of America
Transportation Communications Union
United Transportation Union

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit are reported at 831 F.2d 1231 (3d Cir. 1987) (*"P&LE I"*)

(reproduced in the Appendix to the Petition for a Writ of Certiorari in No. 87-1589 ("App. I") at A-1 to A-13), and 845 F.2d 420 (3d Cir. 1988) (*"P&LE II"*) (reproduced in the Appendix to the Petition for a Writ of Certiorari in No. 87-1888 ("App. II") at 1a - 70a). The opinion of the United States District Court for the Western District of Pennsylvania is reported at 677 F. Supp. 830 (W.D. Pa. 1988) and is reproduced in App. II at 71a - 85a.

JURISDICTION

The judgments at issue herein were entered by the Court of Appeals on October 26, 1987 (App. I at A-1 to A-13) and April 8, 1988 (App. II at 1a - 70a). The Petition for a Writ of Certiorari in No. 87-1589 was filed on March 24, 1988. The Petition for a Writ of Certiorari in No. 87-1888 was filed on May 17, 1988. The Court granted certiorari in both cases on November 28, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution (reproduced in the Appendix to the brief ("App.") at A-18), Sections 2, First, 5, 6 and 10 of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, (reproduced in App. at A-1, A-2, A-8, A-9), Sections 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 and 10901 (reproduced in App. at A-11, A-13) and Section 4 of the Norris-La Guardia Act ("NLGA"), 29 U.S.C. § 104 (reproduced in App. at A-16).

STATEMENT OF THE CASE

Sale of P&LE's Rail Lines

The Pittsburgh & Lake Erie Railroad ("P&LE") is a small rail carrier which operates about 182 miles of railroad in western Pennsylvania, Ohio, and New York. (J.A. 21, 22)[1] At the time this case arose, P&LE had been in severe financial decline for five years, during which time it had accumulated losses totalling $60 million. (J.A. 22, 82) P&LE had fallen upon hard times as a result of the lessening of railroad regulation, which favored the major railroads, the closure of steel mills and other major rail shippers on P&LE's lines, and increased competition from trucking companies. (J.A. 22, 82, 84) P&LE tried to reverse its ill fortune, for example, by drastically reducing its workforce and by trying to expand its system to reach new markets. (J.A. 22, 82-83) P&LE's efforts to reverse its ill fortune did not prove successful. Today, P&LE operates at the sufferance of its major secured creditors. (J.A. 191)

Given P&LE's situation, P&LE's management decided to quit the railroad business. (J.A. 21, 29, 30) P&LE first attempted to interest a major railroad in purchasing its rail lines. None was interested. (J.A. 90) Chicago West Pullman Transportation Company ("CWPT") then approached P&LE about purchasing all of its rail lines. In July 1987, P&LE agreed to sell its rail lines to P&LE Railco, Inc. ("Railco"), a non-carrier CWPT subsidiary. (J.A. 22) Railco planned to operate with about one-third the number of

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1 References to the Joint Appendix are abbreviated as ".A." followed by the appropriate page.

employees employed by P&LE. Railco stated that it would give preference to P&LE employees in establishing its workforce and invited all of P&LE's employees to submit employment applications. Railco also contacted representatives of P&LE's unions about negotiating new collective bargaining agreements to be in place at Railco's start-up. (J.A. 173)

Unions Demand to Bargain Over All Aspects of the Sale

After being informed of the proposed sale on July 31, 1987, P&LE's 14 unions demanded that P&LE bargain with each of them over "all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . ." before consummating the sale to Railco. (J.A. 31, 32) P&LE's unions served a notice, purportedly pursuant to Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, proposing as follows:

1. No employee of the P&LE Railroad Company who [was actively employed or on authorized leave of absence] between August 1, 1986 and August 1, 1987 . . . shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause...The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.

2. If an employee is placed in a worse position with respect to compensation or working conditions,

that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.

3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all [P&LE's] collective bargaining agreements . . . to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transaction and to select the forces to perform the work over the lines being acquired.

(J.A. 38, 42, 46, 50, 54, 58, 62, 66, 122, 126)

Unions Strike to Block Sale

P&LE responded that the purported Section 6 notices were not valid and that it had no duty under the RLA to bargain over the sale of its business, because the sale and its effects on employees were subject to the exclusive jurisdiction of the Interstate Commerce Commission ("ICC"). (J.A. 16, 17, 33) The Railway Labor Executives' Association ("RLEA") initiated this action on behalf of P&LE's unions, seeking to enjoin the sale until P&LE completed the lengthy bargaining, mediation and cooling off procedures of the RLA. (J.A. 7) Rather than pursue RLEA's complaint for injunctive relief, however, on September 15, 1987, the unions

struck P&LE. (J.A. 17, 27)[2] P&LE's unions also threatened to spread the strike to P&LE's connecting carriers if they interchanged any traffic with P&LE. (J.A. 18, 22, 28) The strike had the intended effect of effectively shutting P&LE down and blocking the sale, because Railco could not finalize its financing if it would not be able to operate the railroad and generate revenue to repay its debt. (J.A. 191)

ICC Approves Immediate Sale of P&LE's Lines

P&LE could not go out of business by selling its rail lines to Railco until the ICC approved the sale, because entry into and exit from the railroad business requires the prior approval of the ICC. *See* 49 U.S.C. §§ 10901 (entry), 10903 (abandonment).

Section 10901 of the ICA requires a non-carrier, like Railco, to obtain a certificate of public convenience and necessity from the ICC in order to become a carrier. 49 U.S.C. § 10901; Ex Parte No. 392, *Application Procedures For A Certificate To Construct, Acquire Or Operate Railroad Lines*, 365 I.C.C. 516 (1982); 49 C.F.R. Part 1120. Under Section 10901(c)(1)(A)(ii), the ICC has broad discretionary authority to impose conditions protective of the public

2 In yet another facet of RLEA's strategy to block the sale, RLEA filed a state court action against P&LE, Railco and others under the Pennsylvania Uniform Fraudulent Conveyance Act. RLEA sought to enjoin distribution of the proceeds of the sale and require that they be placed with a trustee until after the state court action had been litigated. P&LE removed the case to federal court, which found the state law complaint was preempted by the RLA. The Third Circuit reversed and ordered the action remanded to state court. *RLEA v. P&LE*, 858 F.2d 936 (3d Cir. 1988). Because the planned sale to Railco has terminated, RLEA dismissed its complaint.

interest. Courts have long interpreted this conditioning authority to include the power to consider the impact of an ICC-authorized transaction on employees and impose labor protective conditions for the benefit of employees on the seller or buyer of a rail line or both. *See, e.g., RLEA v. ICC*, 784 F.2d 959, 965, 969-70 (9th Cir. 1986); *Black v. ICC*, 762 F.2d 106, 116 (D.C. Cir. 1985).[3]

If the ICC determines that regulation is not necessary to carry out national rail transportation policy, it can exempt transactions or classes of transactions from regulatory requirements. 49 U.S.C. § 10505. After five years of experience with individual applications by non-carriers seeking to acquire marginal or failing lines by exemption from the filing requirements of Section 10901, the ICC in its rulemaking proceeding in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (1985) ("*Ex Parte 392*"), *aff'd, Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987), exempted the class of Section 10901 transactions involving non-carriers from the prior approval requirements of Section 10901.

3 This Court upheld the ICC's discretionary authority to require labor protective conditions under the predecessor statute to 49 U.S.C. § 10901, 49 U.S.C. § 1(18), in *ICC v. RLEA*, 315 U.S. 373 (1942). Section 1(18)-(20) granted the ICC jurisdiction over both acquisition of rail lines by a non-carrier and abandonments by carriers. When Congress recodified the ICA in 1978, without substantive change, the ICC's authority under Section 1(18) was split into Sections 10901 (acquisition and construction of lines) and 10903 (abandonment). *See* Pub. L. No. 95-473, 92 Stat. 1337 (1978).

Under the *Ex Parte 392* procedures, a new operator was authorized to acquire a line of railroad and commence operations seven days after it filed its notice of exemption with the ICC. 49 C.F.R. § 1150.32(b).[4] The ICC concluded that allowing non-carriers expeditiously to take over marginal lines, without protracted and costly regulatory proceedings, would improve the chances that these lines could be rehabilitated and remain part of the nation's rail system. The ICC, however, retained jurisdiction over an exempted transaction, and any interested person, including labor, could seek ICC review of a particular sale by filing a petition to revoke the exemption under ICA Section 10505(d). *Ex Parte 392*, 1 I.C.C.2d at 812.

RLEA participated fully in the ICC rulemaking proceedings that led to *Ex Parte 392*. RLEA there asked the ICC to exercise its discretion and impose labor protective conditions on all transactions subject to the exemption. The ICC, however, concluded that the mechanical imposition of labor protective conditions on Section 10901 transactions was not in the public interest, because the cost of such conditions would discourage sales of marginal lines, resulting in their abandonment with a permanent loss of rail service and jobs. *Id.* at 815. The ICC provided instead that labor could seek the imposition of labor-protective conditions in any particular sale transaction by filing a petition to revoke

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4 Since the now defunct sale of P&LE's lines to Railco, the ICC has amended its *Ex Parte 392* procedures. 53 Fed. Reg. 5981 (1988); Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (decided Feb. 29, 1988). The rules, as amended, would require 35 days' advance notice before a Notice of Exemption authorizing the sale of P&LE's rail lines became effective.

the exemption and demonstrating that exceptional circumstances justified their imposition. Rail labor and other interests appealed the ICC's *Ex Parte 392* procedures, which were affirmed in all respects in *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

P&LE Sale to Railco

On September 19, 1987, Railco filed its notice of exemption with the ICC, pursuant to *Ex Parte 392*. (J.A. 99) On behalf of P&LE's unions, which were still on strike, RLEA filed a petition to reject Railco's exemption filing and a related exemption filing by Railco's parent, CWPT. (J.A. 99) RLEA also filed with the ICC a "Complaint for Cease and Desist Order and Other Relief." (J.A. 109) In this Complaint, RLEA argued that the sale was really subject to the ICA's merger and consolidation provisions, which, if applicable, would have required the imposition of mandatory labor protective conditions on the transaction. (J.A. 110, 113-15) RLEA also requested that the ICC postpone the sale in order to consider RLEA's suggestion that P&LE's rail lines be sold to an employee-owned entity through the vehicle of an employee stock ownership plan ("ESOP"), rather than to Railco. (J.A. 97, 115-16)

The ICC refused to reject Railco's exemption notice or stay the effectiveness of the exemption, which became effective September 26, 1987. As explained in its order served September 29, 1987 in *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of The Pittsburgh & Lake Erie R.R. Co. and the Youngstown & Southern Ry.*, Finance Docket Nos. 31121, 31122 and 31126, (decided September 25, 1987), the ICC found that RLEA was

not likely to succeed on the merits of its pleadings and had failed to show it would suffer irreparable harm in the absence of a stay. (App. I at E-6, E-8) Conversely, the ICC found that a stay of the sale would harm P&LE's rail operations and shippers, given P&LE's precarious financial situation, and that "[t]he public interest does not support a grant of a stay." (App. I a: E-8) The ICC reminded RLEA that it should raise its concerns through a petition to revoke as provided by *Ex Parte 392*.

On October 2, 1987, RLEA finally filed with the ICC a petition to revoke the exemptions granted to Railco and its parent. (J.A. 141) Rather than ask for the imposition of discretionary labor protections, as allowed by *Ex Parte 392*, RLEA sought to block the sale altogether, arguing that P&LE was insolvent and that the ICC should consider alternatives to the sale to Railco, including RLEA's ESOP proposal. (J.A. 142, 147, 148, 153, 155) RLEA simultaneously asked the ICC to reconsider and stay consummation of the sale while alternatives to the sale were considered. (J.A. 130) In an order served October 19, 1987, the ICC denied RLEA's petition for reconsideration, but required P&LE to retain its corporate existence until after the ICC completed review of RLEA's petition to revoke. (App. I at F-2, F-3) Although all regulatory approvals were in place, P&LE and Railco could not finalize the sale because of the ongoing strike.

Strike Injunction

On October 8, 1987, the District Court enjoined the strike. (App. I at B-9) The court held that the ICC's authorization of the sale relieved P&LE of any duty to bargain over the effects of the sale on employees and that the

Norris-LaGuardia Act must be accommodated to the ICA, relying upon the Eighth Circuit's decision in *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987). (App. I at B-7, B-8) On October 26, 1987, the Third Circuit in *P&LE I* summarily reversed the District Court's decision, holding that the Norris-LaGuardia Act is not accommodated to the ICA and that the District Court was therefore without jurisdiction to enjoin the strike. The Third Circuit remanded to the District Court for consideration whether the sale or strike violated the RLA. (App. I at A-13) In the meantime, P&LE's unions threatened to resume their crippling strike if P&LE tried to consummate the sale to Railco. (J.A. 187, 191)

Permanent Injunction of Sale

On remand, the District Court held that P&LE did not have an RLA duty to bargain over its decision to go out of business, but did have a duty to bargain over the effects of that decision upon its employees. (App. II at 83a-84a) The District Court also concluded that this obligation was not superseded by the ICC's jurisdiction over the sale. (App. II at 81a) The District Court further held that the RLA's status quo requirements required that P&LE be enjoined from selling its rail lines until after it exhausted the RLA's "purposely long and drawn out" bargaining and mediation procedures, unless the purchaser agreed to hire all of P&LE's existing employees, assume P&LE's labor agreements and recognize P&LE's unions. (App. II at 84a-85a) The Third Circuit upheld the District Court's decision and status quo injunction in *P&LE II*. (App. II at 60a)

Termination of Sale to Railco

As a result of the strike and subsequent Third Circuit decisions, Railco lost its financing and was unable to obtain new financing. Railco was also unwilling to purchase P&LE's lines on the terms required by the status quo injunction, *i.e.*, assumption of all of P&LE's employees, labor agreements and unions. Consequently, the planned sale to Railco was terminated. Petitioner's Supp. Brief, App. C at ¶ 3 (filed Nov. 22, 1988).

RLEA Tries to Arrange Sale to Employees

Beginning in late September 1987 and until the Third Circuit summarily vacated the strike injunction, P&LE and its unions, without prejudice to their respective legal positions, exchanged proposals to address the effects of the sale on employees. (J.A. 157, 166, 170-72) From the beginning of this exchange, P&LE's unions proposed that P&LE's lines be sold to its employees. (J.A. 97, 157, 166, 170-71, 187, 189) An ESOP proposal was submitted to P&LE by RLEA's investment advisor on September 20, 1987. (J.A. 151, 158, 166) P&LE rejected the proposal, because P&LE was already contractually obligated to sell to Railco. (J.A. 164) In addition to the ESOP proposal, the unions' initial proposals requested severance payments for all P&LE employees, both those who were active and those who were laid-off, in the amount of $45,000 each, or approximately $70 million in total. (J.A. 167, 171) This amount exceeded the sale price from Railco. (J.A. 167)

After the sale to Railco terminated, several persons expressed interest in buying all or some of P&LE's assets. Petitioner's Supp. Brief, App. C at ¶ 4. However, as a

practical matter, P&LE could not act on any proposal without the concurrence of all of its unions. *Id.* Therefore, the second proposal considered by P&LE was a RLEA-sponsored plan to be financed by CSX Transportation, Inc. ("CSXT"), a major railroad which connects with P&LE. *Id.* at ¶ 5; (J.A. 189) Under the RLEA-CSXT proposal, P&LE's rail lines would be acquired by an employee-owned company. Ironically, this RLEA employee ownership proposal called for essentially the same reductions in employment levels and changes in work rules that would have resulted under the proposed sale to Railco, to which P&LE's unions had objected so vehemently. This proposal, like the prior ESOP proposal, was submitted by RLEA's investment advisor. RLEA was unable to obtain the agreement of all of P&LE's unions, and the RLEA-CSXT proposal was terminated. *Id.*

Although P&LE undertook effects bargaining after the Third Circuit's April 6, 1988 decision in *P&LE II*, P&LE reluctantly agreed, at RLEA's request, to forego that bargaining while RLEA pursued its latest employee ownership plan. *Id.* at ¶ 6. P&LE has now asked the National Mediation Board ("NMB") to resume mediation of the court-ordered effects bargaining. *Id.* at ¶ 8. Thus, nine months after *P&LE II*, and 16 months after the parties first exchanged effects proposals, P&LE is still locked in the RLA's procedures with no definite end in sight. While P&LE remains interested in finding a buyer for its rail lines, the Third Circuit's rulings make a sale impossible without the concurrence of all of P&LE's unions.

SUMMARY OF ARGUMENT

In *P&LE II*, the Third Circuit concluded that under the Railway Labor Act a railroad cannot go out of business unless it first exhausts RLA bargaining with its unions over the "effects" of that decision. That ruling conflicts with the rationale underlying this Court's recognition that an employer has an "absolute" right to go out of business, *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 270 (1965), and that a decision to close part of a business represents a fundamental exercise of managerial prerogative over which an employer has no mandatory bargaining obligation. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The "almost interminable" collective bargaining procedures of the Railway Act make the doctrine of managerial prerogative and the non-mandatory nature of "decision" bargaining even more crucial to carriers subject to the RLA than it is to employers in industries subject to the National Labor Relations Act.

Contrary to the Third Circuit's reading of the RLA, a duty to bargain over the "effects" of a decision to go out of business does not give rise to any status quo obligation that would preclude implementation of that decision before such bargaining is exhausted. No "effects" bargaining is required where, as here, the unions' bargaining proposals seek to delay or interfere with the decision itself, or where the effects of the decision fall within the exclusive jurisdiction of the ICC. Even if some effects bargaining were proper, however, the status quo that must be maintained during such bargaining includes the employer's right to go out of business, and therefore necessarily permits the loss of jobs that accompanies the exercise of that right. *See First National*

Maintenance, 452 U.S. at 686. In the absence of an existing contract provision restricting the employer's right to go out of business, a union cannot block an employer's exercise of that right merely by proposing to amend the contract to include such a restriction. The Third Circuit's interpretation of a carrier's status quo obligation stands the status quo requirement on its head, and gives the unions the "powerful tool for achieving delay . . . that might be used to thwart management's intentions" that this Court has previously rejected. *See id.* at 683.

If the Court finds that the RLA does not require effects bargaining when a carrier decides to go completely out of business, then there is no conflict between the RLA and the ICA. However, even if the Court finds that carriers generally have a duty to bargain over the effects of management decisions regarding the scope of the business, the Court should find that any such bargaining obligation was superseded here by the ICC's exclusive jurisdiction to approve, on such terms and conditions as it finds in the public interest, P&LE's management decision to go out of business. Under the ICA, P&LE cannot close operations as a railroad without prior ICC approval. Congress, moreover, has treated the issue of labor protection to address employee impacts of ICC-regulated transactions in the ICA.

The Third Circuit refused to accommodate the RLA or NLGA to the ICA, because the Third Circuit concluded that such an accommodation would repeal the RLA by implication. When several federal statutes address the same subject, under this Court's precedents the proper analytical approach is to reconcile them "to 'make sense' in combination . . . ." *United States v. Fausto*, 108 S. Ct. 668,

676 (1988). This is particularly true where, as here, what is allegedly being repealed by implication is not express statutory text, but implications derived by the court from the RLA. Nothing in the text of the RLA requires that a carrier remain in business during effects bargaining. Conversely, the express text of the ICA gives the ICC exclusive jurisdiction over P&LE's decision to go out of business and the effects of that decision on employees, shippers and others who may be affected by that decision. At rail labor's request, Congress gave detailed treatment to labor protection matters in the ICA, not in the RLA. For more than 50 years, rail labor has looked exclusively to the ICC's labor protection authority to address the employee impacts of ICC-regulated transactions. By failing to give any effect to the congressional policies in the ICA, the Third Circuit has frustrated Congress' intent that the ICC be the final arbiter of a national transportation policy, which encourages the sale of marginal rail lines, such as P&LE's, to new operators.

The Third Circuit also failed to follow this Court's accommodation precedents by refusing to accommodate the ICA to the NLGA's general ban of injunctions in labor disputes. This Court has accommodated the NLGA to other statutes enacted as part of a pattern of federal labor law. *E.g., Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). Congress' historical treatment of labor protection in the ICA was part of the pattern of legislation dealing with railway labor. Additionally, the strike was separately enjoinable as a violation of the RLA, because the unions were seeking to compel P&LE to bargain over a non-mandatory subject (its decision to sell to Railco), and engaged in self-help prior to the exhaustion of the RLA's

procedures for resolving their effects proposals, if in law there was an effects bargaining obligation.

Finally, in failing to accommodate the ICA, RLA and NLGA, the Third Circuit adopted a statutory interpretation that unnecessarily gave rise to a constitutional infirmity. Here, the Third Circuit's construction of the RLA and NLGA resulted in a taking of P&LE's property, in violation of the Fifth Amendment.

ARGUMENT

I. The Railway Labor Act Does Not Require That A Railroad Exhaust That Act's Collective Bargaining Procedures Before Implementing A Decision To Go Out Of Business

A. A Railroad's Decision To Go Out Of Business Is A Fundamental Managerial Prerogative Over Which It Has No Duty To Bargain

1. Decisions Regarding The Existence, Scope And Direction Of An Enterprise Are Peculiarly Matters Of Managerial Prerogative That Need Not Be Bargained

As this Court has recognized in several contexts, certain decisions are so fundamental to the existence and management of a business that they may be made without regard to their potential impact on employees. In *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) ("*Darlington*"), this Court held that an employer does not unlawfully interfere with its employees' rights under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), by going out of business entirely, even if motivated by anti-union animus, because "an employer has the *absolute right* to terminate his entire business for any reason he pleases . . . ." 380 U.S. at 268 (emphasis added). "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative

intent or unequivocal judicial precedent . . . . We find neither." *Id.* at 270.

This Court explained that "a complete liquidation of a business yields no . . . future benefit for the employer" vis-a-vis its employees, because "[t]he closing of an entire business . . . ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place." *Id.* at 272, 274. The Court specifically recognized that just as employees are free to quit their employment, so too may an employer "withdraw from that status with immunity, so long as the obligations of any employment contract have been met." *Id.* at 271. Such reciprocal rights to terminate the employment relationship are grounded in "the very permanence" of such actions. *Id.* at 272.

In *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964), this Court held that the replacement of existing bargaining unit employees with those of an independent contractor was a mandatory subject of bargaining under the NLRA, but distinguished the nature of that decision from one which would "alter the Company's basic operation." 379 U.S. at 213. The Court noted that "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U.S. at 213. In a concurring opinion, Justice Stewart explored the scope of the duty to bargain, rejecting a broad interpretation of the NLRA's phrase "conditions of employment" that would have required an employer to bargain over "any subject which is insisted upon as a prerequisite for continued employment." 379 U.S. at 221. Although he noted that certain subjects which "concern the very existence of the employment itself,"

such as discharge, seniority, and compulsory retirement, are mandatory bargaining subjects, *id.* at 222, Justice Stewart distinguished them from other management decisions which could "clearly imperil job security, or indeed terminate employment entirely," such as the decision to liquidate and go out of business. Those decisions, he explained, "lie at the core of entrepreneurial control" and therefore "are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Id.* at 223.

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), this Court adopted Justice Stewart's analysis in addressing the scope of an employer's duty to bargain over a decision to close part of its operations. The Court held that a decision to terminate part of a business was not a mandatory subject of bargaining because it was not part of the "wages, hours, and other terms and conditions of employment" over which an employer must bargain under the NLRA. *See id.* at 686. The Court reasoned that mandatory subjects of bargaining were only those "amenable to resolution through the bargaining process." *First National Maintenance*, 452 U.S. at 678.

> [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id. at 679.[5] Applying this test, the Court explained that the decision to shut down part of a business is not amenable to resolution through the bargaining process because a "union's practical purpose in participating . . . will be . . . to delay or halt the closing." *Id.* at 681.

> Labeling this type of decision mandatory could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

Id. at 683. This Court therefore concluded that although bargaining over a decision to close part of a business was *permitted*, the decision itself was not among the terms and conditions of employment over which Congress *mandated* bargaining.

2. The Practical Effect Of The Third Circuit's Decision Is To Eliminate The Managerial Prerogatives Of RLA Employers

Characterizing this case as a dispute over the effects on P&LE's employees of its decision to go out of business rather than one over the decision (App. II at 16a), the Third Circuit nevertheless appeared to recognize that, as a practical matter, its conclusion that P&LE had a duty to exhaust

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5 The Court cautioned that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed," and "there is an undeniable limit to the subjects about which bargaining must take place." *Id.* at 676.

bargaining over the effects of its decision prior to implementation would give the unions a virtual veto power over the decision itself. (App. II at 17a, 57a) That power is a consequence of the cumbersome bargaining procedures mandated by Section 6 of the RLA, 45 U.S.C. § 156, which this Court has described as "purposely long and drawn out," *Brotherhood of Steamship Clerks v. Florida East Coast R.R.*, 384 U.S. 238, 246 (1966), and "almost interminable," *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149 (1960). *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). An RLA employer is not free to resort to "self help" -- that is, to implement a proposed change in agreements -- until the bargaining procedures of Section 6 are exhausted, a release has been obtained from the National Mediation Board, and, in some cases, a Presidential Emergency Board has been created and has recommended a solution. 45 U.S.C. §§ 156, 160; *see Jacksonville Terminal*, 394 U.S. at 378. Most business transactions--even those in which time is not expressly of the essence--simply cannot await completion of an "almost interminable" process before consummation. As this Court noted in *First National Maintenance*, a union will have little incentive to complete the bargaining process quickly where the end result is certain to be the loss by its members of their jobs. 452 U.S. at 681. The protracted nature of the RLA bargaining process gives the unions the "powerful tool for achieving delay" that this Court decried in *First National Maintenance*. 452 U.S. at 683.

The "absolute" right to "decide" to go out of business is rendered meaningless if an employer, while nominally free to make that decision, cannot implement it without first

exhausting its bargaining obligation over the effects. Although this Court held in *First National Maintenance* that under Section 8(a)(5) of the NLRA a union must be given a meaningful opportunity to bargain over effects, 452 U.S. at 681-82, nothing in that case suggests that such bargaining must reach an impasse before the decision can be implemented. Indeed, where the nature of the transaction at issue permits only very short notice to the unions it may be impossible to reach an impasse by the time the transaction occurs. The clear implication of *First National Maintenance* is thus that bargaining over effects need *not* be completed before a non-bargainable decision can be implemented.[6]

Furthermore, in applying the effects bargaining obligation, the courts as well as the NLRB have tailored the timing and scope of the employer's duty to bargain to the requirements of the transaction, finding no duty to bargain over effects prior to the transaction where to do so would be

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6 Even if *First National Maintenance* could be read to require the exhaustion of effects bargaining prior to implementation of a decision, that ruling should not be extended to cases arising under the RLA. Under the NLRA, the parties are required to bargain only until they reach impasse, and need not await a determination by a government agency of when impasse has been reached. By contrast, under the RLA only the National Mediation Board may determine when further bargaining or mediation would be fruitless, and even then the parties must wait another thirty days before engaging in self help. This process frequently takes months, if not years, to complete. *See IAM v. NMB*, 425 F.2d 527 (D.C. Cir. 1970). In contrast to the bargaining procedures under the NLRA, the bargaining procedures of Section 6 of the RLA are totally incompatible with the "need for speed, flexibility, and secrecy" that often accompanies business transactions. *See First National Maintenance*, 452 U.S. at 682-83; *IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 557 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972).

impractical or would be tantamount to bargaining over the decision itself.[7]

Although *Darlington* and *First National Maintenance* were decided under the NLRA, there is no reason in logic or law to conclude that an employer's right to make fundamental management decisions is any less broad under the RLA. The scope of the duty to bargain under the RLA is, if anything, narrower than the duty to bargain under the NLRA.[8] *See Inland Steel Co. v. NLRB*, 170 F.2d 247, 254-55

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7 *See, e.g., Yorke v. NLRB*, 709 F.2d 1138, 1143-44 (7th Cir. 1983) (no prior bargaining over effects required before "emergency" closing of plant); *IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 558 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) ("To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place."); *Raskin Packing Co.*, 246 N.L.R.B. 78 (1979); *National Terminal Baking Corp.*, 190 N.L.R.B. 465 (1971).

8 Section 8(d) of the NLRA, 29 U.S.C. § 158(d), defines the mandatory subjects of bargaining under that Act as "wages, hours, and other terms and conditions of employment." Section 6 of the RLA, 45 U.S.C. § 156, lists as mandatory subjects of bargaining those matters "affecting rates of pay, rules, or working conditions". The original Taft-Hartley bill, which had been passed in the House of Representatives, contained a specific listing of issues subject to mandatory bargaining. H.R. 3020, 80th Cong., lst Sess.(1947), *reprinted* in 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 166-67 (1948). However, this "attempt to 'strait-jacke[t]' and to 'limit narrowly the subject matters appropriate for collective bargaining' was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d)." *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 495-96 (1979).

Significantly, the bill which was originally introduced in the Senate had used the phrase "other working conditions", the term which

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(7th Cir. 1948), *aff'd on other grounds sub nom. American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).[9]

A decision to go out of business is the quintessential managerial prerogative. If an employer may not make *that* decision without first bargaining with its unions, this Court's decisions in *Darlington* and *First National Maintenance* are virtually meaningless.[10] Such a decision is at the "core of

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defines the scope of mandatory bargaining under Section 6 of the RLA, instead of "other conditions of employment" to define the scope of mandatory bargaining under the NLRA. Senator Wagner, however, strongly objected to the use of the term "working conditions", which he viewed as narrowing the scope of collective bargaining. "By substituting the narrower term 'working conditions' for the broader term 'conditions of employment', the bill would narrow the scope of collective bargaining to exclude many subjects . . . ." 93 Cong. Rec. 3322, 3323 (1947). The Senate subsequently passed the Taft-Hartley Act including the language "other conditions of employment" rather than "working conditions."

9 *See also* Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 393 (1950) ("'Conditions of employment' is a broader phrase than working conditions.").

10 In *First National Maintenance* this Court described its decision in *Order of R.R. Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960), as involving a request by a union that a railroad "bargain over its decision to close down certain stations, thereby eliminating a number of jobs." 452 U.S. at 686 n.23. The Court went on to distinguish its holding in *First National Maintenance* from that in *Telegraphers*, referring, *inter alia*, to its "expansive" interpretation of a railroad's bargaining obligation under Section 2, First, 45 U.S.C. § 152, First, and to the "aims of Railway Labor Act and national transportation policy." *Id.* at 686-87. Despite this Court's description of *Telegraphers* in *First National Maintenance*, *Telegraphers* did not involve a union request to bargain over the railroad's *decision* to close stations; rather, the dispute centered on the union's proposal to amend the existing collective

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entrepreneurial control" and is no less fundamental and central to an RLA employer than it is to an NLRA employer. *See IAM v. Northeast Airlines, Inc.*, 473 F.2d at 556-57 (no duty to bargain over decision to merge operations with another airline); *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976) ("Whatever . . . benefits may nonetheless accrue to Union members from implementation of [the union's Section 6 proposal] are outweighed by [the carrier's] proper interest in retaining basic control over the size and direction of its enterprise."); *ALPA v. Transamerica Airlines, Inc.*, 123 L.R.R.M. (BNA) 2682, 2687 (E.D.N.Y. 1986) (there is "no reason . . . why [a] . . . carrier should be required to bargain over its decision to go completely out of business, solely because it is covered by the RLA.").

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bargaining agreement by adding a provision forbidding the abolishment of any position in existence as of a certain date except by agreement with the union. 362 U.S. at 332. *See* 452 U.S. at 336 ("Plainly the controversy here relates to an effort *on the part of the Union* to change the 'terms' of an existing collective bargaining agreement.") (emphasis added); 452 U.S. at 341 ("The . . . dispute grew out of the failure of the parties to reach agreement on the contract change *proposed by the union*.") (emphasis added). Although the Court held that the union's proposal was a lawful subject of bargaining, *Telegraphers* did not address at all the railroad's right to close the stations while such bargaining took place.

B. Neither The Loss Of Jobs That Would Result From P&LE's Decision To Go Out Of Business Nor The Unions' Bargaining Proposals Gave Rise To A Status Quo Obligation Under The RLA That Would Preclude Implementation Of P&LE's Decision

The Third Circuit held that bargaining over the effects of the decision to go out of business was required for two reasons. First, the court found that the "loss of jobs by possibly two-thirds of the employees [that would result from the decision] clearly would require a 'change in agreements affecting rates of pay, rules, or working conditions,'" which could not be unilaterally imposed without bargaining. (App. II at 17a) Second, the court found that "even if that were not the case, P&LE's unions have proposed substantial changes to the agreements" as a result of which P&LE had to "preserve...those actual, objective working conditions and practices, broadly conceived, which were in effect" when the dispute arose, which "plainly include the very existence of the workers' jobs." (App. II at 18a) As shown below, neither the loss of jobs that would result from P&LE's decision nor the changes in agreements proposed by the unions gave rise to any status quo obligation that would preclude P&LE from going out of business.

1. P&LE's Decision To Go Out Of Business Did Not Require A Change In Rates Of Pay, Rules, Or Working Conditions

Acknowledging that going out of business might not violate P&LE's collective bargaining agreements, the Third

Circuit nevertheless asserted that going out of business would "*change* the nature of those agreements" and thus would create a "major" dispute[11] under the RLA. (App. II at 18a (emphasis in original)) "Whenever a party intends to implement such a change, the RLA requires that the party submit to the major dispute resolution process and not alter the status quo." *Id.* The Third Circuit's reasoning is in fundamental conflict with the principles underlying *Darlington*, *Fibreboard*, *First National Maintenance*, and other cases recognizing that certain rights are inherently those of management, and remain within management's prerogative except to the extent modified by legislation or collective agreement. The RLA does not by its terms restrict management's exercise of such rights, but rather merely creates a process by which such restrictions may be bargained.[12] In the absence of an express contractual provision, a collective bargaining agreement does not constitute a guarantee of employment, but rather only sets out

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11 "Major" disputes are those over the formation of collective bargaining agreements or efforts to secure them. "They arise where there is no such agreement or where it is sought to change the terms of one . . . . They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945), *opinion adhered to*, 327 U.S. 655 (1946). In contrast, "minor" disputes relate "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future." *Id.*

12 *See Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 402-03 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937); *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. Steamship Clerks*, 281 U.S. 548, 571 (1930); *United States Steel Corp. v. Nichols*, 229 F.2d 396, 399-400 (6th Cir.), *cert. denied*, 351 U.S. 950 (1956).

the terms of any employment that is available. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944). The unions made no claim here that their contracts contained any such express guarantees of employment or any prohibitions on P&LE's right to go out of business.[13] The loss of jobs thus would not "change" the agreements in any respect.

The Third Circuit cites *Order of R.R. Telegraphers v. Chicago and North Western Ry.*, 362 U.S. 330 (1960), for the proposition that the RLA mandates bargaining "when a decision affects the very existence of the workers' jobs." (App. II at 21a) *Telegraphers* involved a union bargaining proposal relating to a railroad's decision to close several underutilized stations and to consolidate certain work in a central location, as a result of which employees would be furloughed. 362 U.S. at 332. Unlike P&LE, the railroad in *Telegraphers* intended to *continue* operating along the same right of way under *different* conditions; it did not intend either to cease operating altogether or to stop performing the work performed by the employees whose jobs were to be abolished. The railroad refused to bargain over the union's Section 6 proposal that positions not be abolished except by agreement between the carrier and the union, 362 U.S. at 332, claiming that the union's proposal was improper. The railroad sought to enjoin the union's strike over its refusal to bargain.

The ultimate issue in *Telegraphers* was whether the Norris-La Guardia Act prohibited a strike injunction in these circumstances. *See* 362 U.S. at 331, 335, 343. The Court

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13 Indeed, the record shows that P&LE had furloughed more than two-thirds of its unionized workforce. (J.A. 82, 83)

rejected the railroad's contention that the union's bargaining proposal was an unlawful attempt to bargain over the decision itself, 362 U.S. at 338-40, finding instead that the change the union sought was a lawful bargaining subject, and thus that the Norris-LaGuardia Act did not permit a strike injunction. 362 U.S. at 335, 342-43. *Telegraphers* did not discuss whether a duty to bargain would have arisen in the absence of the *union's* proposal to amend the agreement. Nothing in *Telegraphers* can fairly be read to imply that the loss of jobs that would result from the railroad's decision standing alone would give rise to a duty to bargain.[14] So understood, *Telegraphers* is fully consistent with P&LE's position herein.

The Third Circuit erroneously confused a railroad's duty to bargain upon receipt of a proper Section 6 notice with a duty to refrain from taking action before bargaining takes place. *Telegraphers* does not support that proposition, and the rationale of *Darlington*, *First National Maintenance*, and a host of other cases is to the contrary. Like the NLRA, the RLA simply imposes no status quo on an employer that would prevent it from implementing a decision to go out of business.

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14 The Third Circuit also relied on the twenty-three-year-old decision in *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965). (App. II at 23a) *Galveston Wharves* is plainly inconsistent with the rationale of *Darlington* and predates this Court's decision in *First National Maintenance*. Moreover, the facts of *Galveston Wharves* much more closely resemble the decision to sub-contract in *Fibreboard* than the decision to go completely out of the railroad business at issue here.

2. The Unions' Section 6 Notices Did Not Create Any Status Quo Obligations That Would Prevent P&LE From Going Out Of Business

a. The Unions' Proposals Improperly Sought To Bargain Over The Decision Itself

Without discussing the actual content of the unions' Section 6 notices, the Third Circuit held that the service of such notices created a "major dispute" and a status quo obligation prohibiting P&LE from going out of business. Even a brief examination of the notices reveals that they would have required P&LE to renegotiate the sales agreement to the disadvantage of Raiico.[15] Under the circumstances, the proposals were unreasonable and P&LE could legitimately refuse to entertain them. *See Northeast Airlines*, 473 F.2d at 558-59, cited with approval in *First National Maintenance*, 452 U.S. at 683 n. 20.

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15 J.A. 38, 42, 46, 50, 54, 58, 62, 66, 122, 126; *see supra*, pp. 4-5. The unions proposed to amend the existing agreements to provide, in effect, lifetime guaranteed employment, compensatory and treble damages for any employee who received anything short of lifetime employment, and a requirement that P&LE agree to require any purchaser of its assets to assume all collective bargaining agreements with, and obligations to, P&LE's union-represented employees.

b. The Filing Of Section 6 Notices Cannot Serve To Eliminate An Existing Managerial Prerogative During Bargaining

The right to exercise "management prerogatives" recognized in this Court's decisions in *J.I. Case, Darlington, Fibreboard, and First National Maintenance* is part of the "status quo" -- the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Shore Line*, 396 U.S. at 153. The Third Circuit failed to recognize that unless expressly restricted by an express or implied agreement between the parties, fundamental management rights are also part of the status quo. Mere service of a Section 6 notice does not prevent an employer from exercising rights that it could have exercised in the absence of such a notice. As the Third Circuit had previously held in *Baker v. UTU*, 455 F.2d 149 (3d Cir. 1971), "[i]f management had had the ability . . . before the notice, depriving it of that ability . . . throughout the long, deliberately drawn out process of negotiations and mediation under the Act, would not be a continuation of any prior existing condition. It would be the creation of a new condition." 455 F.2d at 157.

Like the RLA, the NLRA also imposes a status quo obligation during bargaining. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 833 n.5 (1988); *First National Maintenance*, 452 U.S. at 674-75; *NLRB v. Katz*, 369 U.S. 736 (1962). Yet, as noted above, implicit in this Court's ruling in *First National Maintenance* is a conclusion that bargaining over the effects

of a decision need not be completed before the decision is implemented. *See supra* pp. 22-23. This conclusion flows from the fundamental nature of a decision to go out of business and the recognition that the loss of jobs resulting from such a decision does not constitute a violation of that status quo requirement. In this respect, the RLA status quo obligation is no different than that under the NLRA.

Nothing in *Shore Line* is to the contrary. *Shore Line* dealt with a carrier's proposed unilateral change in the location at which its employees reported for work assignments, not with the cessation of a carrier's operations or even with the elimination of jobs. The Court explained that the status quo includes both written agreements and "omitted cases." 396 U.S. at 154-55.[16] The discussion of the "status quo" in *Shore Line* was based in large part on the peculiar practice in the railroad industry of leaving substantial portions of what would otherwise be "rules or working conditions" out of written collective bargaining agreements. 396 U.S. at 153-54. The Court sought to make clear that the status quo included not only express written agreements but also "omitted" or uncovered working conditions which would fairly be said to have been mutually agreed to by the parties. Nothing in *Shore Line* suggests that an agreement to remain in business could ever be inferred from the mere existence of employment, or that the

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16 *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945). In that case, this Court explained that an omitted case refers to "some incident of the employment relation or asserted one, independent of those covered by the collective agreement, *e.g.*, claims on account of personal injuries." *Id.*

employer's continued operations could be considered an "omitted" condition.

The logic of *Shore Line* extends only to true *conditions* of work, not to the *existence* of the employer at all. The Third Circuit's reading of *Shore Line* simply cannot be squared with this Court's pronouncement in *Darlington* that "an employer has the absolute right to terminate his entire business for any reason he pleases," 380 U.S. at 268, or with its ruling in *J.I. Case* that a collective bargaining agreement does not constitute a guarantee of employment. 321 U.S. at 334-35. Certainly, *Shore Line* does not constitute the "unequivocal judicial precedent" which *Darlington* requires before a court could even "entertain" the proposition adopted by the Third Circuit.[17]

The issuance of an injunction against the sale to Railco effectively gave the unions and the employees benefits that they had not obtained through bargaining. The Third Circuit analysis stands the status quo requirement on its head and allows a union, by the artful use of a carefully worded Section 6 notice, to interfere in and frustrate management decisions in which it has no legitimate right to participate.

17 The Third Circuit's reliance on *Telegraphers* to infer a status quo obligation was misplaced. Nothing in *Telegraphers* supports the proposition that implementation of a decision to go out of business may be enjoined pending exhaustion of RLA bargaining procedures merely because it may affect "the very existence" of jobs. *See supra* pp. 29-30. It was the union's Section 6 proposal, not the railroad's decision to close some stations, that this Court found to be a lawful subject of bargaining.

II. The ICC's Exclusive Jurisdiction Over Railroad Line Sales Supersedes Any RLA Duty To Bargain Over Effects

Even if this Court were to conclude that the RLA required that P&LE exhaust bargaining over the effects of its decision before it could go out of business, any such obligation was superseded by the ICC's exclusive jurisdiction over the acquisition of rail lines by a non-carrier like Railco, which includes authority to consider the effects of the sale on employees and impose labor protective conditions for the benefit of affected employees.

A. The ICC Has Exclusive Jurisdiction Over The Sale Of P&LE's Rail Lines

As this Court has previously recognized, "[t]he Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Because railroads are infused with the public interest, unlike other businesses they cannot unilaterally implement management decisions to expand or shrink their systems, or go out of business, but must first obtain ICC approval. *See* 49 U.S.C. § 10901(a) (acquisition of line by non-carrier); § 10903 (abandonment); §§ 11341-47 (mergers and consolidations).

In the mid-1970's, concern that over-regulation was contributing to the economic decline of the nation's railroads led Congress to streamline ICA regulation in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R

Act"), Pub. L. No. 94-210, 90 Stat. 31, and later the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.[18] Although the the 4R and Staggers Acts created procedures to encourage new entrants to take over marginal operations, they did not eliminate the ICA requirement that ICC approval be obtained before a railroad could go out of business by selling or abandoning its rail lines.[19]

The Third Circuit found in *P&LE II* that *Ex Parte 392*, pursuant to which the ICC approved the P&LE sale, was consistent with the "strong congressional policy to remove regulatory burdens and to expedite sales of struggling railroads . . . ." (App. II at 33a) Nonetheless, building on its erroneous conclusion in *P&LE I* that rail labor only had a "small voice of protest" at the ICC (App. I at A-12), the Third Circuit further concluded that the "interests of labor are, at best, only a relatively small concern of the ICC." (App. II at 48a) The Third Circuit further concluded that, because Congress did not amend the RLA to parallel changes to the ICA made by the 4R and Staggers Acts, Congress intended to leave "the RLA intact as the mechanism for labor to assert its own interests." (App. II at 48a) There was no need to amend the RLA, however, because Congress had

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18 Congress was especially concerned that regulatory delay in allowing railroads to restructure their operations, including abandonment of unprofitable lines, was draining their financial health. *See, e.g.*, S. Rep. No. 94-499, 96th Cong., 2d Sess. 102, 106-07 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 14-15, 121-22.

19 Where the purchaser will operate the rail lines, the ICC has interpreted the ICA not to require that the selling carrier also obtain abandonment authorization. *See, e.g., RLEA v. United States*, 697 F.2d 285, 286 (10th Cir. 1983).

already given detailed treatment of the effects of ICC-regulated transactions on employees in the ICA. This treatment clearly evidenced Congress' intent that the ICC's exclusive jurisdiction encompassed the effects on employees of transactions approved by it, including line sales. Otherwise, if the effects of ICC-regulated transactions were left to the RLA, application of the RLA would threaten the consummation of ICC-approved transactions and frustrate national transportation policy. *See, e.g., Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 451 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). Indeed, for more than 50 years, rail labor has not applied the RLA procedures to address employee impacts of ICC transactions, but has looked to the labor protective authority of the ICC. Congress' treatment of labor protection in the ICA was at the request of labor, which has had a significant influence in shaping the ICA, in particular its labor protective provisions. *See, e.g , Simmons v. ICC*, 760 F.2d 126, 130 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

B. Congress Intended That The Effects Of Sales Of Lines Be Addressed Exclusively By The ICC

1. Congress Addressed The Effects Of ICC-Regulated Transactions In The ICA

Originally, the ICC's authority to consider employee impacts derived from its general authority to impose such conditions on transactions which it found to be in the public interest. *United States v. Lowden*, 308 U.S. 225, 233-35 (1939). Recognizing that implementation of the national transportation policy of encouraging railroad mergers "will

unavoidably subject railroad labor relations to serious stress," this Court upheld the ICC's discretionary authority to impose conditions addressing the effects on labor. *Id.* at 233. The ICC would not have needed such authority, of course, if the RLA had been understood to provide a mechanism to obtain such protections. *Id.* at 235-36.

In 1940, Congress passed the Transportation Act of 1940, 54 Stat. 906, one of the principal purposes of which "was to provide mandatory protection for the interests of employees affected by railroad consolidations." *RLEA v. United States*, 339 U.S. 142, 148 (1950). The 1940 Act added Section 5(2)(f) to the ICA (now 49 U.S.C. § 11347), which mandated that the ICC impose at least a minimum level of protection in merger cases, making "mandatory with respect to unifications the protections for workers that had previously been discretionary." *ICC v. RLEA*, 315 U.S. 373, 379 (1942).[20] In enacting Section 5(2)(f), Congress rejected an alternative resolution of the labor protection issue, the Harrington Amendment. Under the Harrington Amendment, a merger could be authorized by the ICC only upon condition that no employees of the involved carriers be adversely affected. *See, e.g., RLEA v. United States*, 339 U.S. at 150-51. Because mergers necessarily have adverse impacts on employees, "the Harrington Amendment . . . threatened to prevent all consolidations to which it related." *Id.* at 151.

In 1942, this Court again addressed the scope of the ICC's discretionary labor protection authority in *ICC v.*

20 The ICA does not use the shorthand term labor protection, but speaks in terms of "a fair arrangement" for affected employees. *See, e.g.*, 49 U.S.C. § 11347.

RLEA, 315 U.S. at 373. The Court held that the ICC had discretionary authority to impose labor protective conditions on its approval of abandonments. The Court applied the same reasoning as in *Lowden* in concluding that the interests of labor must be factored into the national transportation policy, because abandonments had direct impacts on employees. 315 U.S. at 378-79. Courts have similarly interpreted the ICC's jurisdiction over acquisitions of rail lines to include discretionary authority to impose labor protective conditions. *See, e.g., Black v. ICC*, 762 F.2d 106, 111, 116 (D.C. Cir. 1985).

When enacting the 4R and Staggers Acts, Congress realized that employees would lose their jobs or otherwise be adversely impacted by carrier actions taken pursuant to those Acts' initiatives. This was not lost on rail labor, who pressed Congress to address employee impacts in the ICA.[21] Consequently, in the 4R Act, Congress increased the statutory minimum level of labor protection the ICC was required to impose in mergers. Pub. L. No. 94-210, § 402(a).[22] Congress also made mandatory the imposition of labor protective conditions on abandonments of less than a

21 *See, e.g., Railroads - 1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1104-07 (1975) (testimony of W. G. Mahoney, Counsel, RLEA); *Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681, Before the Subcomm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 382 (1975)(testimony of C.J. Chamberlain, Chrm'n, RLEA) and 594 (testimony of C.L. Dennis, Int'l Pres., Bhd. of Ry., Airline & S.S. Clerks).

22 *See, e.g., New York Dock Ry. v. United States*, 609 F.2d 83, 88-90 (2d Cir. 1979).

railroad's entire system where the ICC's imposition of such conditions had previously been discretionary. *Id.* § 802 (amending 49 U.S.C. § 1a(4), recodified at 49 U.S.C. § 10903(b)(2)).

Labor stated its opposition to further deregulatory initiatives, unless labor protective provisions were added to the ICA protecting employees "from all adverse effects of the legislation." *Railroad Deregulation Act of 1979: Hearings Before the Subcomm. on Surface Transp. of the Senate Commerce Comm.*, 96th Cong., 1st Sess. 961 (1979) (testimony of W. G. Mahoney, Counsel, RLEA); *see also id.* at 926, 957-62. Accordingly, Congress also gave "extensive consideration" to labor protection issues in the Staggers Act. *Simmons v. ICC*, 766 F.2d 1177, 1181 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). When Congress made it easier for an existing railroad to construct a new rail line, Pub. L. No. 96-448, § 221, Section 10901(e) was added to require that, if the ICC imposed discretionary labor protections, it had to impose at least a statutorily prescribed minimum level. Congress otherwise left undisturbed the ICC's discretionary authority whether and what level of labor protections to require in Section 10901 transactions.[23] Where the Staggers

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23 The Third Circuit's analysis erroneously assumed that the ICC's authority to impose discretionary labor protections in sales to non-carriers derived from 49 U.S.C. § 10901(e). *P&LE I* (App. I at A-8); *P&LE II* (App. II at 34a). Section 10901(e), which was added by the Staggers Act, Pub. L. No. 96-448, § 221, has nothing to do with this case. Subsection (e) is concerned with labor protection when the ICC approves the construction of a new rail line by an existing carrier. The ICC's authority to require labor protective conditions in sales of existing lines to non-carriers is found in Section 10901(c)(1)(A)(ii). *See, e.g., Black v. ICC*, 762 F.2d 106, 111, 116 (D.C. Cir. 1985); *Ex Parte 392*, 1 I.C.C.2d at 815.

Act authorized the ICC to require the sale of marginal lines to a new operator, it required that the new operator operate the line with employees hired from the selling carrier "to the maximum extent practicable." 49 U.S.C. § 10910(e). The ICC was also required to impose labor protections on the selling carrier for the benefit of its employees affected by such sales. *Id.* § 10910(j); *see also* Pub. L. No. 96-448, § 219(g) (requiring that rate bureau employees who lost their jobs because of the Staggers Act receive labor protections); *id.* § 223 (authorizing the ICC to impose discretionary protections on reciprocal switching arrangements); *id.* § 227 (requiring Bankruptcy Court to impose labor protections on abandonment of lines by bankrupt railroad).

During congressional consideration of predecessor legislative proposals to the Transportation Act of 1940, Congress rejected a proposal that "protection of the employees was a matter that could be better handled by negotiation and agreement . . . ." under the RLA and instead left responsibility for labor protection with the ICC, thereby ensuring that labor disputes over labor protection would not block ICC-approved consolidations.[24] To the extent that such inaction indicates Congress' intent, that inaction

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24 *Hearings on Omnibus Transportation Bill: Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 1722 (1939) (Vol. 2)(testimony of ICC Commissioner Eastman). The legislation recommended by Commissioner Eastman would have exempted railroad mergers from federal antitrust law and other federal and state law, except the RLA, stating "[n]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Subcomm. Print, 76th Cong., 1st Sess. § 309 (April 22, 1939).

confirms that Congress intended the ICC's labor protection authority to be the exclusive source of protections in ICC-regulated transactions.

More recently, rail labor has repeatedly asked Congress to amend Chapter 109 of the ICA, which includes Section 10901, to mandate labor protections in all line sales and to specify that labor's rights and agreements under the RLA were not superseded by ICC approvals of such line sales.[25] While fully aware of *Ex Parte 392*, the ICC's policy not to impose labor protection on sales of marginal lines, and labor's displeasure with that policy, Congress has declined to enact such legislation.[26] Thus, Congress has not been

25 In 1979, RLEA proposed a new ICA Section 10910, which would have required that "[n]o transaction shall be approved under Subchapter I of Chapter 109 of this title involving a carrier or carriers by railroad . . . unless employee protective arrangements shall have been certified by the Commission as fair and equitable in the circumstances of each transaction." *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 before the Senate Comm. on Commerce, Science and Transp.*, 96th Cong., 1st Sess. 536, 544 (1979) (testimony of J.R. Snyder, Chairman, Legis. Comm., RLEA). Subsequently, in 1986, during consideration of the Conrail Privatization Act, Pub. L. No. 99-509, § 4001, *et seq.* (1986), rail labor was again unsuccessful in persuading Congress to require labor protections in Section 10901 transactions. H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 250 (1986). More recently, rail labor sponsored several bills that would amend the ICA to require labor protective conditions in all line sales. *See, e.g.*, H.R. 3332, 100th Cong., 1st Sess. (1987). H.R. 3332 also could have provided that the ICA does not preempt any rights under the RLA.

26 *Rapid Growth of Short-Line and Regional Railroads: Hearing Before the Subcomm. on Transp., Tourism and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (testimony of R. Kilroy, Chairman, RLEA); *Short Line and Regional Railroads: Hearing Before the Subcomm. on Surface Transp. of the*

continued

inactive in addressing the effects on employees of ICC-approved transactions. Congress has given such effects detailed consideration in the ICA.[27]

2. The ICC Has Expertise In Resolving Labor Protection Issues

Similarly, the Third Circuit's conclusion that the ICC lacks labor expertise is also incorrect. (App. II at 50a, 53a). Pursuant to its ICA authority, as interpreted by this Court and amended by Congress, the ICC has been fashioning labor protection conditions for more than 50 years. *See, e.g.*,

Senate Commerce Comm., 99th Cong., 2d Sess. 86 (1986) (testimony of O. Berge, Chairman, RLEA).

27 Congress deemed some railroad restructurings to be too large or complicated to be resolved through the usual ICC procedures and enacted special legislation to facilitate these restructurings. These enactments include the Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*, which created Amtrak to take over intercity passenger operations from railroads desiring to exit the passenger business; the Milwaukee Road Restructuring Act, 45 U.S.C. § 901, *et seq.*, which was enacted to facilitate the restructuring of the Milwaukee Road, then in bankruptcy; the Rock Island Employee Assistance and Training Act, 45 U.S.C. § 1001, *et seq.*, which was primarily designed to address the effects on Rock Island Railroad employees from its liquidation; the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, *et seq.*, which created Conrail to take over the operations of bankrupt railroads in the Northeast. All of these restructurings had significant impacts on labor. Rail labor testified before Congress on all of this legislation. In all of these enactments, Congress established the applicable labor protections or procedures for agreement on protective conditions addressing the effects on employees. 45 U.S.C. §§ 565, 797, 908 & 1005. In no case was there any indication rail labor could ignore these statutes' treatment of labor protection issues and assert rights under the RLA for different protective benefits or otherwise to block transactions even though none contained an express preemption of the RLA or NLGA.

United States v. Lowden, 308 U.S. 225, 235 & n.5 (1939). In reviewing its labor protection authority, the ICC observed that "[f]or more than fifty years the Commission has exercised its authority in this field, frequently at the request of and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period." *FRVR Corp.-Exemption Acquisition and Operation, Certain Lines of Chicago & North Western Transp. Co.*, ICC Finance Docket No. 31205 (decided Jan. 28, 1988) ("*FRVR*") (App. II at 121a). Rail labor, including RLEA, has actively participated in ICC proceedings on labor protection issues.[28]

3. Rail Labor Has Historically Looked To The ICC To Address The Effects Of ICC-Regulated Transactions

The conclusion that Congress intended that labor protection issues be resolved solely by the ICC, pursuant to the ICA, is also confirmed by the past behavior of labor and management. In *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961), this Court found it significant that an interpretation of the ICC's labor protection authority had been "acquiesced in by all interested parties for 20 years . . . ." *Id.* at 179. For the past 50 years

28 For example, RLEA and its union members actively participated in the proceedings where the ICC has formulated the standard labor protective condition currently imposed in mergers, *New York Dock Ry. -- Control-Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); abandonments, *Oregon Short Line R.R.-Abandonment - Goshen*, 360 I.C.C. 91 (1979); and trackage rights and leases, *Mendocino Coast Ry.-Lease and Operate California Western R.R.*, 360 I.C.C. 653 (1980).

rail labor and management have looked exclusively to the ICC for labor protections to address the effects on employees of ICC-regulated transactions. Even when dissatisfied with the ICC's labor protection decisions, rail labor has not, until now, asserted the ability to use its strike weapon. Instead, it has petitioned the courts or Congress for greater protections under the ICA.[29] If, as the Third Circuit concluded, Congress intended the RLA as the mechanism to protect labor's interest, in each of these cases the unions could have simply obtained a status quo injunction or struck when dissatisfied with the ICC's labor protection decision.

Thus, the historical treatment of the effects on employees from ICC-regulated transactions by Congress, the ICC, labor, and management demonstrates that all understood

29 *See, e.g., BMWE v. United States*, 366 U.S. 169 (1961) (union argument for job freeze for four years rejected); *RLEA v. United States*, 339 U.S. 142 (1950) (unions contest ICC limitation on length of protective period); *ICC v. RLEA*, 315 U.S. 373 (1942) (unions contest ICC refusal to impose any labor protections on abandonment); *RLEA v. United States*, 697 F.2d 285 (10th Cir. 1983) (unions contest ICC refusal to impose protections on buyer of rail line); *Knox and Kane R.R. - Gettysburg R.R. - Petition for Exemption*, 366 I.C.C. 439 (1982) (unions protest ICC decision not to impose any protections on buyer or seller of rail line); *Prairie Trunk Ry. - Acquisition and Operation*, 348 I.C.C. 832, 838, 852 (1977), *aff'd, Illinois v. United States*, 604 F.2d 519 (7th Cir. 1979) (ICC refuses to require acquirer of rail line to succeed to selling carrier's labor agreements and representation); *Railroads - 1975, Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the Senate Commerce Comm.*, 94th Cong., 1st Sess. 1105 (1975) (testimony of W.G. Mahoney, Counsel, RLEA). Even when expressing its dissatisfaction, RLEA did not suggest it could remedy any perceived shortcomings in the ICC's treatment of labor protection simply by asserting allegedly independent effects bargaining rights under the RLA. Rail labor clearly understood it was limited to the ICA for protections and pressed Congress to amend the ICA.

and intended that such effects would be addressed, not through RLA procedures, but solely through the ICC's labor protection authority.

C. The Third Circuit Failed To Give Any Effect To The ICA Or The ICC's Jurisdiction

The Third Circuit's failure to accommodate the RLA to the ICA completely frustrated Congress' express statutory language and policies embodied in the ICA in at least four separate ways. First, the Third Circuit has compromised the ICC as the exclusive arbiter of the national railroad transportation policy. Under the ICA, the ICC must weigh competing interests, including labor, and determine whether a transaction is in the overall public interest. 49 U.S.C. § 10101a. *See, e.g., Lowden*, 308 U.S. at 237 (upholding broad conditioning authority to assure transaction is in public interest). Now, however, rail labor can subordinate the public interest to its own and substitute its judgment for the ICC's by utilizing its new-found leverage under the RLA to block ICC-approved transactions of which labor disapproves, unless the transaction is on terms and conditions satisfactory to labor, even if found contrary to transportation policy by the ICC.

Second, *Ex Parte 392* has been effectively repealed, even though it was affirmed on judicial review, and even though the Third Circuit agreed that it was in fulfillment of congressional intent in the Staggers Act and that the sale of P&LE's lines was the kind of sale intended to be covered by *Ex Parte 392*. The ICC's conclusion that labor protection costs will discourage sales of marginal lines and encourage abandonments, thereby causing a permanent loss of rail

service and jobs, was reasonable and precisely the kind of judgment which Congress left to the ICC's discretion. Rail labor, however, disagrees with the policy decision made in *Ex Parte 392* and can now block such sales by striking or obtaining a RLA injunction.

Third, Congress' treatment of labor protection in the ICA has been rendered a nullity. Nothing in the legislative history of the ICA suggests that Congress intended the labor protections imposed by the ICC to be binding only on carriers and to be merely a floor above which unions were free to negotiate a better arrangement under the RLA. As the Eighth Circuit held in *Missouri Pacific R.R. Co. v. UTU*, 782 F.2d 107, 112 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987), "it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." That is precisely what happened here. Although RLEA had ample opportunity to request the ICC to impose discretionary labor protections on the sale, and has so requested in other exempted sales,[30] it elected not to do so here.

Finally, the Third Circuit's decisions are totally at odds with the structure and intent of the ICA. Congress gave the ICC exclusive jurisdiction over entry into and exit from the railroad business. Congress also went to great lengths, in the 4R and Staggers Acts, to expedite the regulatory process P&LE or other carriers must undergo before they can cease being a carrier. Congress factored in labor's interest by

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30 *See, e.g., PLEA v. United States*, 811 F.2d 1327 (9th Cir. 1987).

amending the ICA's labor protection provisions. Now, on top of this process, the Third Circuit has made P&LE's decision to go out of business subject to yet another regulatory process, the RLA. Application of the "purposefully long and drawn out" procedures of the RLA completely cancels Congress' very specific amendment of the ICA to expedite entry into and exit from the railroad business. Moreover, the decision of when P&LE ultimately can cease operations has been taken out of the ICC's heretofore exclusive jurisdiction, and placed with another federal agency, the NMB. The NMB, not the ICC, will effectively determine when P&LE can exit the railroad business by deciding when to release P&LE and its unions from mediation, and thereby start the 30-day cooling off period before parties can use self-help. *See, e.g., IAM v. NMB*, 425 F.2d 527, 533 (D.C. Cir. 1970). Yet, the NMB has no expertise in transportation matters generally and no obligation to consider the same range of interests.

D. Limiting Rail Labor To Labor Protections Required By The ICC Does Not Repeal The RLA by Implication

The Third Circuit believed that any accommodation of the ICA, RLA, and NLGA which would deprive labor of its strike weapon would repeal by implication the plain language of the RLA. (App. II at 6a, 44a-45a) Relying on this Court's holding in *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981), the Third Circuit held that such repeals are disfavored. (App. II at 45a) However, as this Court explained in *United States v. Fausto*, 108 S. Ct. 668, 676 (1988), this principle of statutory construction applies only to repeal by implication of express statutory text. The Court

differentiated such repeal from "repeal by implication of a legal disposition implied by a statutory text . . . ." *Id.* at 676. Judicial interpretation of a statute's implication can be repealed by the implications of a later statute. That is the case here.

Nothing in the RLA, either in its express terms or legislative history, states that a carrier must bargain over the effects of its decision to go out of business as a carrier or, if there were such an obligation, that such effects bargaining must be exhausted before the sale of its rail lines is consummated. The Third Circuit's conclusion that the RLA is designed to delay certain management decisions, in order to give rail labor leverage (App. II at 40a), is nothing more than an implication divined from the RLA by the Third Circuit, and an incorrect one at that, as explained in Part I. A carrier's decision whether to be in business at all is not a mandatory subject of bargaining and therefore the RLA was not intended to give labor leverage over that decision.

For railroad managements, such a decision is made subject to the ICC's jurisdiction, not by implication, but by the express statutory text of the ICA. 49 U.S.C. §§ 10901(a), 10903(a). While the RLA is silent on effects bargaining, Congress has given detailed attention to the effects of ICC-regulated transactions in the ICA. *See, e.g.*, 49 U.S.C. §§ 10901(e), 10903(b)(2), 10910(e) & (j). Thus, the conclusion that Congress intended that effects be addressed solely by the ICC does not repeal the RLA by implication. However, even if the implications of the RLA found by the Third Circuit ever had any validity, they were dispelled and "altered by the implications of later statutes," the 4R and

Staggers Acts, and their comprehensive treatment of labor protection issues. *Fausto*, 108 S. Ct. at 676.

The accommodation of the RLA to the ICA, where the ICC has jurisdiction to impose labor protective conditions, gives effect to the policies of both statutes. Rail labor can still utilize the RLA to bargain the effects of management decisions not subject to the ICC's jurisdiction. The Third Circuit's "accommodation," however, gave absolutely no effect to the congressional purpose of the ICA and therefore was contrary to the requirement of this Court that effect be given to all statutes. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

E. All Judicial Decisions Prior To *P&LE II* Recognized That The ICC Has Exclusive Jurisdiction To Address The Effects Of ICC-Approved Transactions

Until *P&LE II*, every court to consider whether the ICC's authority to impose labor protection supersedes inconsistent requirements of the RLA concluded that it must.[31] In *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987), at least four Justices were prepared to hold that the ICC's jurisdiction supersedes any inconsistent RLA requirements. *Id.* at 2376-78 (Stevens, J., concurring).

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31 *See, e.g., Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 804 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R. Co. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert denied*, 107 S. Ct. 3209 (1987); *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

The Third Circuit distinguished this precedent on the basis that it involved ICA Section 11341(a), which expressly exempts merger transactions from "all other law," and because ICC labor protections were actually imposed in those cases. (App. I at A-12, A-13 n. 8)

An express preemption is unnecessary because, as previously explained, nothing in the statutory language of the RLA mandates effects bargaining before a railroad exits the railroad business. Moreover, the ICC's jurisdiction over sales and abandonments is as plenary as its jurisdiction over mergers, even though the ICA provisions governing the former do not contain an express preemption. There is certainly no basis for concluding that Congress intended the ICC to be able to consider and reconcile competing interests in railroad consolidations subject to ICA Chapter 113, but not in sales or abandonments of rail lines subject to ICA Chapter 109. The Eighth Circuit recognized the artificial nature of this distinction in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), where it held the ICC's jurisdiction under Section 10901 preempted the RLA. Similarly, it makes no sense that Congress intended that labor could disrupt the sale of a rail line to a non-carrier, a Section 10901 transaction, but not the sale to an existing carrier, a Section 11341(a) transaction. Furthermore, such a distinction would allow labor to strike over Section 10903 abandonments, even though labor protection is mandated in abandonment of anything less than an entire system. 49 U.S.C. § 10903(b)(2). Moreover, if Section 10901 could not have preemptive effect unless it contained express language as found in Section 11341(a), which also references "State and municipal law," it could not even preempt inconsistent state law. That is clearly

not the case. *See Chicago & North Western Transp. Co. v. Kalo Brick & Tile Corp.*, 450 U.S. 311 (1981); *Transit Commission v. United States*, 289 U.S. 121, 127 (1933). Finally, this Court has had no trouble accommodating the NLGA to the RLA, even though the RLA contains no express preemption of NLGA. *See, e.g., Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).[32]

Whether the ICC imposes protections in any particular case also does not affect the exclusivity of its jurisdiction. As the ICC observed in *FRVR*, its "[j]urisdiction is not determined by outcome." (App. II at 122a) If the ICC's jurisdiction to address effects issues was exclusive only if the ICC actually imposed protections, then the ICC effectively would be deprived of its discretion to impose such protections in Section 10901 transactions, even though Congress has not chosen to limit that discretion.

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32 An express preemption was also not necessary to find that the Civil Aeronautic Board's ("CAB") analogous discretionary labor protection authority under the Federal Aviation Act preempted inconsistent RLA requirements. *See, e.g., IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) ("One of the policies behind this grant of [labor protective] authority to the CAB is to prevent mergers . . . in the public interest from being obstructed by labor disputes"); *see also Kesinger v. Universal Air Lines Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *Kent v. CAB*, 204 F.2d 263, 265-66 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953); *Hyland v. United Airlines, Inc.*, 254 F. Supp. 367, 372 (N.D. Ill. 1966).

III. The RLA Injunction Was A Collateral Attack Upon The ICC's Orders Authorizing The Immediate Sale Of P&LE's Lines

The status quo injunction was also an impermissible collateral attack upon the ICC's orders finding that the immediate sale of P&LE's rail lines to Railco was in the public interest, because the necessary effect of the injunction was to vacate those orders.

Under the Hobbs Act, only the Courts of Appeals have jurisdiction to "enjoin, set aside, suspend . . . or to determine the validity of" ICC orders. 28 U.S.C. § 2342(5); *see also id.* § 2321. In *P&LE II*, the Third Circuit found no collateral attack, because it concluded the ICC's orders approving the sale were merely "permissive." (App. II at 37a) No distinction between "mandatory" and "permissive" orders is recognized in the Hobbs Act, which makes all ICC orders reviewable only as provided in Title 28. Indeed, the Third Circuit's attempted distinction would vitiate the Hobbs Act's requirements, because many orders of the ICC, as well as of other agencies whose orders are subject to review under the Hobbs Act, permit rather than require action. This Court rejected such a distinction in *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), where it stated: "[t]hat the [ICC] order is not mandatory but permissive makes no difference in this regard." *Id.* at 131. What this Court found significant was that the effect of the requested injunction was to enjoin the railroads "from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." *Id.* at 130. Here, the status quo injunction prevented P&LE from doing what *Ex Parte 392* and the ICC's September 25, 1987 order refusing to stay

the sale specifically authorized -- sale of its rail lines to Railco after seven days' notice. Thus, the District Court's status quo injunction effectively "adjudged invalid and set aside" those orders, contrary to the jurisdictional requirements of the Hobbs Act.

The Third Circuit attempted to distinguish *Venner* on the basis that the injunction merely "delayed" implementation of the ICC-approved sale, while the injunction requested in *Venner* "truly would have blocked the approved transaction . . . ." (App. II at 38a-39a, n.27). The injunction, however, not only delayed the sale, it killed it. Moreover, the indefinite delay of the sale had the impermissible effect of modifying the ICC's orders. The Third Circuit's characterization of *Venner* as simply a federal preemption case also was invalid. The Supreme Court's decision was founded solely on the impact of the relief requested on the ICC's order.

The Third Circuit stated that it would have reached a different result if the injunction had "overturn[ed] an administrative determination that a delay or collapse of the sale and the imposition of labor protection would harm the public interest." (App. II at 38a) That was precisely what the ICC found, concluding that "[t]he public interest does not support a grant of a stay. Rather, it is in the public interest to allow the class exemption to take effect, and to address the issues raised by Petitioners via the revocation process." (App. II at 103a) The ICC also explicitly found in *Ex Parte 392* that the imposition of labor protection was not in the public interest, because the costs of such protection could discourage the sale. 1 I.C.C.2d at 815.

The Third Circuit also concluded that "[t]he mere fact that a government agency has refused to impose an economic solution on a private labor dispute does not imply that the agency has refused to allow the parties themselves to bargain for and reach an agreement" and that the ICC merely determined that consummation of the sale without labor protection would not be "extraordinarily unfair." (App. II at 41a-42a) However, because the ICC had exclusive jurisdiction to approve all terms and conditions of the sale, the parties' disagreement over the extent of labor protections to be required as a condition of the sale was not a private labor dispute. Moreover, the ICC did not merely refuse to impose labor protections; it affirmatively found in *Ex Parte 392* that the imposition of labor protections on the sale of marginal lines was not in the public interest. Thus, the status quo injunction effectively vacated and reversed the ICC's order in *Ex Parte 392* to the extent it applied to this sale, and the ICC's September 25, 1987 Order, because both concluded that expeditious sale without labor protection was in the public interest.

Courts have consistently refused to allow unions to avoid Hobbs Act review of ICC orders by asserting conflicting rights under the RLA, even when those orders are "permissive." *See, e.g., UTU v. Norfolk & Western Ry.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988) (a union "merely by drafting an artfully worded [RLA] complaint, [cannot] avoid the bar of a clearly applicable jurisdictional statute."); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) (dismissing request for RLA status quo injunction as "in essence, a

collateral attack upon the ICC's order."). This is also true for line sales. *See RLEA v. Chicago & North Western Transp. Co.*, 129 L.R.R.M. (BNA) 3054 (8th Cir. 1988), *pet. for cert. pending*, 57 U.S.L.W. 5376 (U.S. Nov. 29, 1988) (No. 87-2049); *RLEA v. Staten Island R.R.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987) ("Under no circumstances could [RLEA's] request be granted without recission or modification of the ICC's order."); *accord, Oling v. ALPA*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).[33]

P&LE II must be reversed or else rail labor can avoid the ICC's jurisdiction and congressionally mandated procedure for review of ICC orders simply by filing a RLA complaint and seeking to enjoin the ICC-approved transaction in District Court.

IV. The NLGA Did Not Bar A Strike Injunction

The District Court premised its strike injunction entirely upon the ICA. In *P&LE I*, the Third Circuit vacated that injunction on the basis that the NLGA, 29 U.S.C. § 101, *et seq.*, is not accommodated to the ICA. The Third Circuit concluded that accommodation of the NLGA was required only if there was an irreconcilable conflict with another statute and the other statute was enacted as part of a pattern of federal labor legislation. (App. I at A-6) The Third Circuit's conclusion that the ICA could not in any aspect be considered labor legislation, which was central to its rulings

33 The contrary appellate court decisions are *P&LE II* and *RLEA v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988), *pet. for cert. pending*, 57 U.S.L.W. 3262 (U.S. Sept. 26, 1988)(No. 88-517), which simply follows *P&LE II*.

in *P&LE I* and *II*, was erroneous. Additionally, the District Court independently had jurisdiction to enjoin the strike as violative of the RLA.

A. The NLGA Must Be Accommodated To The ICA Because The ICA's Labor Protection Authority Is A Labor Statute

This Court's leading case involving the accommodation of other statutes to the NLGA is *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), which held that the NLGA did not bar an injunction of a strike over a minor dispute within the meaning of the RLA. This Court reasoned that, because Congress provided in the RLA that minor disputes be resolved through binding arbitration, it could not have intended that the parties be able to utilize self-help to resolve such disputes. After weighing the policies of the NLGA against judicial intervention in labor disputes versus the policies of the RLA for arbitration of minor disputes, this Court reasoned as follows:

> [T]he [RLA] channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.

Id. at 41. *See also Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937) (injunctive relief available to enforce RLA's representation dispute procedures). This same balancing analysis requires that Congress' treatment of labor protection in the ICA be considered part of the pattern of

legislation dealing with railway labor matters Clearly, the interest of labor is at the heart of the ICC's labor protection conditioning authority, as this Court recognized in *Lowden* and *ICC v. RLEA*. Similarly, labor has been active before Congress in shaping the ICC's labor protection authority. By dealing with labor protection issues in the ICA, Congress has "channeled" them "into special processes intended to compromise them . . . ." Those special processes are the detailed processes of the ICC, including the right of judicial review. Just as Congress placed minor and representation disputes into the exclusive jurisdiction of, respectively, arbitrators and the NMB, disputes over labor protection in ICC-regulated transactions have been channeled into the exclusive jurisdiction of the ICC.

Congress determines whether a statutory minimum level of protections is to be required, as in the case of mergers. If labor protection is mandated, the ICC determines what level satisfies the statute, and whether, in the exercise of its discretion, protections should be required beyond the statutorily required minimum. In other cases, such as line sales to non-carriers, Congress has left complete discretion to the ICC to determine what level of protections, if any, should be required. In either case, rail labor has the full right and opportunity to participate in the ICC proceedinqs to determine the level of protections to be required. Here, labor had the ability to raise labor protection issues through a petition to revoke as provided for in *Ex Parte 392*, 1 I.C.C.2d at 812; 49 C.F.R. § 1150.34. If dissatisfied with the ICC's decision, rail labor can seek reconsideration from the ICC or seek judicial review in the Court of Appeals pursuant to the Hobbs Act.

In those circumstances when the ICC imposes labor protective conditions, rather than resolve disputes growing out of those conditions in the first instance itself, the conditions provide for arbitration. *See, e.g., New York Dock Ry. - Control - Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84, 87-88 (1979). The arbitrator's decision is an order of the ICC, and labor has the right to seek its review by the ICC. *See, e.g., IBEW v. ICC*, No. 87-1629 (D.C. Cir. Nov. 25, 1988). If rail labor is dissatisfied with the ICC's review of the award, it can appeal that ICC decision. *See, e.g., UTU v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988). Thus, Congress has provided in the ICA a comprehensive scheme for the resolution of labor protection issues arising out of ICC-regulated transactions.

The Eighth Circuit properly accommodated the NLGA to the ICA in *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987) ("*Mopac*"). The Eighth Circuit adopted the reasoning of the District Court, which analogized the ICC's labor protection authority to labor legislation and therefore found accommodation consistent with *Chicago River*, 353 U.S. at 30. *See, e.g.*, 580 F. Supp. 1490, 1506 (E.D. Mo. 1984). In *Burlington Northern v. UTU*, 848 F.2d at 856, the Eighth Circuit concluded that the ICC's jurisdiction over Section 10901 was not accommodated to the NLGA, because there was no express preemption of other laws in Section 10901,[34]

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34 The Eighth Circuit also concluded there was no accommodation unless the ICA-mandated labor protection. 848 F.2d at 863. Such a requirement robs the ICC of discretion to require labor protections when Congress left its conditioning authority discretionary.

as there was in the ICA's merger provisions at issue in *Mopac*. However, this Court's accommodation analysis has never required that there be an express preemption. No such express preemption was necessary to accommodate the NLGA to the RLA. Likewise, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the NLGA was held not to bar injunction of a strike in violation of a no-strike clause in a collective bargaining agreement subject to the NLRA, even though the NLRA did not expressly preempt the NLGA. This Court recognized that, as Congress legislated on labor matters "without extensive revision of many of the other enactments, including the anti-injunction section of the Norris-LaGuardia Act. . . . it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.* at 251. Similarly, the Third Circuit should have reconciled the NLGA to ICA Section 10901, even though Congress did not there include an express preemption of the NLGA, because Congress channeled all disputes over the effects of Section 10901 sales to the ICC.

Clearly, the principal reason the Third Circuit refused to accommodate the NLGA to the ICA was the Third Circuit's belief that the ICC's labor protection authority was not a reasonable alternative to labor's strike weapon. In order for a substitute to be meaningful, the Third Circuit believed it had to allow for the possibility of either negotiation or economic self-help. (App. I at A-6, A-7) This belief is irreconcilable with *Chicago River* and *Boys Markets*, where this Court found arbitration was a reasonable substitute even though arbitration did not allow for negotiation or self-help. *Accord, Brotherhood of Locomotive Engineers v. Louisville*

Nashville R.R., 373 U.S. 33, 40 (1962) (union cannot strike to enforce arbitration award).

The Third Circuit justified its preservation of labor's strike weapon by its conclusion that labor had only a "small voice of protest" at the ICC, because labor protections are purely discretionary in Section 10901 sales and because, in *Ex Parte 392*, the ICC placed the burden of persuasion for labor protections on rail labor. (App. II at 42a) However, it was not for the Third Circuit to substitute its judgment for that of Congress that the ICC was a satisfactory forum to resolve labor protection matters or that after-the-fact remedies were adequate under 49 U.S.C. § 10505(d). *See, e.g.*, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980). Nor was the Third Circuit to second-guess the ICC's judgment that labor protections should not automatically be required in sales of marginal lines.

The conclusion that labor has a small voice of protest at the ICC greatly misjudges labor's historic involvement in shaping the ICC's labor protection authorities, both in Congress and at the ICC, and the right to judicial review. In any event, the ICC must consider the impacts on labor from the sale of a rail line, whether the ICC's labor protection authority is completely discretionary, as in a Section 10901 transaction, or whether the ICC approves a sale by way of its exemption authority under Section 10505, as in the sale of P&LE's lines to Railco. In all cases, the ICC must justify its labor protection decisions. *See, e.g., RLEA v. United States*, 811 F.2d 1327, 1329-30 (9th Cir. 1987); *RLEA v. ICC*, 784 F.2d 959, 972 (9th Cir. 1986) (ICC is required to present a "carefully articulated, reasoned balancing of factors pertinent to the particular acquisition . . . ."). Moreover, RLEA here

did not even avail itself of the opportunity provided by Congress and the ICC to request labor protections; RLEA deliberately chose not to request such protections, although it sought other relief in its petition to revoke Railco's exemption.

This Court's decision in *Telegraphers* does not support the Third Circuit's refusal to accommodate the NLGA to the ICA. Contrary to *PL&E I's* erroneous conclusion, P&LE's arguments were not "comparable to those . . . rejected by the Supreme Court in [*Telegraphers*]." (App. I at A-9) *Telegraphers* did not involve any transaction subject to the jurisdiction of the ICC or any orders of the ICC. Unlike the ICC, the state agencies in that case did not have ICA authority to impose labor protection as a condition of permitting the closure of stations. In that regard, the Third Circuit's reliance on the fact that, at the time of *Telegraphers*, Congress required the ICC to impose labor protections in mergers was similarly completely misplaced, because *Telegraphers* did not involve an ICC-regulated transaction.

The Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), also provides no support for *P&LE I*. In *Texas & New Orleans*, the Fifth Circuit refused to accommodate the NLGA to the ICC's approval, pursuant to Section 5(f) of the ICA (now 49 U.S.C. §§ 11341-47), of a railroad consolidation, even though the ICC had imposed the statutorily required labor protection. *Texas & New Orleans* is factually different from the *P&LE*

cases. In *Texas & New Orleans*, the carriers first tried to change existing labor contracts through the RLA process by serving Section 6 notices and initiating bargaining. After they failed to reach agreement with one union, they included their proposed work rule changes in their application for ICC approval of consolidated operations. Here, P&LE was not seeking to change any of its existing agreements, because those agreements did not require it to stay in business. The ICC's orders authorizing the sale of P&LE's lines did not alter P&LE's existing agreements in any way. In any event, *Texas & New Orleans'* failure to accommodate NLGA to the ICA suffers from all the same defects as *P&LE I*.[35]

Significantly, the *Texas & New Orleans* opinion has not been followed by any other Circuit. The ICC and every court since *Texas & New Orleans* have concluded that the ICC's jurisdiction over mergers and consolidations preempts inconsistent requirements of the RLA and the NLGA. *See, e.g., Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th

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35 The Fifth Circuit also misread the proviso to Section 5(2)(f), which allows the parties to negotiate a labor protective arrangement different from that which the ICC would impose. 307 F.2d at 160. Such a negotiated protective arrangement becomes part of the ICC's order approving the merger. *See, e.g., Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 43 (1971). This proviso merely allows, but does not require, carriers and unions to agree on the labor protective arrangement which satisfied the ICA, rather than have the ICC fashion the labor protections. The ICC must still independently satisfy itself that the agreed-to protective arrangement satisfied the ICA. *Id.* at 43. If the parties do not agree upon a protective arrangement, that disagreement does not allow the unions to strike. They then petition the ICC to use its discretionary authority to require more than the statutory minimum. In the case of consolidations, the ICC's recent consistent practice has been to impose its *New York Dock* conditions. *See, e.g., CSX Corp-Control-Chessie System, Inc. and Seaboard Coast Line Industries Inc.*, 363 I.C.C. 521, 588 (1980).

Cir. 1988); *Brotherhood of Locomotive Engineers v. Boston and Maine Corp.*, 788 F.2d 794, 804 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R.R. v. UTU*, 782 F.2d at 107; *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

Finally, even the *Texas & New Orleans* court would accommodate the NLGA to the ICC's jurisdiction when, after unions had had a chance to express their views, the ICC determined the unions' demands were contrary to the public interest. 307 F.2d at 161-62. That was the case here. RLEA had a chance to present its labor protection views in the *Ex Parte 392* rulemaking and in its petition to revoke the exemptions granted to P&LE's purchaser. The ICC found in *Ex Parte 392* that such conditions were contrary to the public interest in sales of marginal lines.

Thus, under a proper application of this Court's accommodation cases, and to make sense of the ICC's jurisdiction to approve sales of rail lines and resolve labor protection disputes, the NLGA must be accommodated to the ICA.

B. The Strike Was Separately Enjoinable As A Violation Of The RLA

Under this Court's longstanding precedent, the NLGA is accommodated to the RLA to allow injunction of RLA violations. *See, e.g., Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 582 (1971); *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937).

The strike violated the the RLA in two different ways. First, as explained in Part I, *supra*, P&LE was under no mandatory duty to bargain over the unions' Section 6 notices, because they sought to bargain over P&LE's decision to go out of business. Alternatively, any RLA duty to bargain over the sale was superseded by the ICC's jurisdiction. In each case, neither decision nor effects bargaining was mandatory. A union, or carrier, which seeks to bargain to impasse or threatens to strike over a non-mandatory subject violates the duty to bargain in good faith and make and maintain agreements contained in Section 2, First of the RLA. 45 U.S.C. § 152, First. *See, e.g., Chicago & North Western Ry. v. UTU*, 402 U.S. at 574; *Japan Air Lines Co. v. IAM*, 538 F.2d at 52. Upon learning of P&LE's decision to go out of business, P&LE's unions were no more free to strike than P&LE would have been unilaterally to reduce wages under its agreements.

Second, even if this Court were to conclude that P&LE had a mandatory duty to bargain over the effects of the sale which was not superseded by the ICC's jurisdiction, its unions had not exhausted the RLA's major dispute procedures governing bargaining over their Section 6 effects notices. P&LE's unions were free to strike only after having exhausted the RLA's major dispute procedures. Their strike prior to the exhaustion of those procedures violated the RLA. *See, e.g., Local 553, TWU v. Eastern Air Lines, Inc.*, 695 F.2d 668, 674 (2d Cir. 1982). The implementation of the sale while effects bargaining went forward would not violate the RLA, because, as previously explained, the sale of P&LE's rail lines did not change working conditions or the status quo within the meaning of the RLA.

Thus, under a proper accommodation of the NLGA, ICA, and RLA, which gives effect to all three statutes, the strike by P&LE's unions to block the sale was enjoinable either as a violation of the ICA or the RLA or both.

V. The Order Constitutes An Impermissible Taking Of P&LE's Property In Violation Of The Fifth Amendment

As applied in this case, the RLA caused an impermissible taking of P&LE's property in violation of the Fifth Amendment to the United States Constitution. Property ownership carries with it a "bundle of rights," including the "right to possess, use[,] and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). The Fifth Amendment prohibits the federal government from taking private property for a public purpose without just compensation. While the "classical" taking occurs when the government either acquires title to or physically occupies private property, a "takings analysis is not necessarily limited to outright acquisitions by the government for itself." *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982). Government action in the form of regulation can also constitute a taking that requires just compensation.[36] *See*

36 "Government regulation ... involves the adjustment of rights for the public good," *Andrus v. Allard*, 444 U.S. 51, 65 (1979); thus, property owners must tolerate some restrictions on property use. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987). However, "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *See Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3148 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164

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Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3146-50 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Regulations and statutes that have the effect of taking private property are also subjected to takings analysis even though they were not enacted with such an intention. *See United States v. Security Industrial Bank*, 459 U.S. at 78-82; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

By requiring P&LE to secure a prospective purchaser's contractual commitment to assume P&LE's labor contracts, employee complement, and RLA obligations if P&LE sold its assets prior to either securing new agreements or exhausting the RLA process, the order entered by the District Court below created a new condition on any sale agreement that P&LE enters with a prospective purchaser. The court's imposition of a "successorship" requirement changed the nature of the original transaction and caused its cancellation. Since that time, no purchaser has been willing to agree to the requirements imposed by the court order. Thus, the "successorship" clause, which the court believed the RLA required, impermissibly interfered with P&LE's right to dispose of its property. *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984). P&LE has lost over $60 million since 1982 and the interest on its debt is accruing at a rate of about $800,000 per month. While RLA bargaining continues, P&LE's assets erode and its debt

(1978); *see also Railroad Commission of Texas v. Eastern Texas R.R., 264 U.S. 79, 85 (1924), Bullock v. Railroad Commission of Florida*, 254 U.S. 513, 520 (1921); *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 399 (1920) (government order compelling private railroad to stay in business at hopeless loss constituted a taking).

increases, which causes a direct loss to the property owners -- P&LE's shareholders and creditors.[37]

The final option suggested by the District Court was that P&LE reach an agreement with its unions over the "effects" of the sale, thereby freeing itself to move forward. As P&LE has demonstrated above, the unions recognize full well that their "effects" proposal, if agreed to by P&LE, would simply accomplish by contract that which the court order has temporarily done - it would render P&LE's assets unsellable.

This Court has recognized that there is a point at which the loss to the owner through erosion of assets becomes "unreasonable even in light of the public interest" served by requiring the carrier to remain in business. *Regional Railroad Reorganization Cases*, 419 U.S. 102, 124 (1974). No public interest is served by the ongoing "bargaining" in this case. The protracted and often interminable RLA processes were intended to further agreements between RLA employers and employees. P&LE intends to terminate its status as an RLA employer. Thus, there is no need for the RLA dispute resolution process to be

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37 After the Railco transaction failed, and during the pendency of the RLEA-CSXT joint venture, there were negotiations to form an employee-owned railroad to be called Newco. After obtaining ICC approval, Newco would operate the property as a new carrier. While this proposal ultimately failed because the unions could not reach agreement, P&LE was compelled to accelerate liquidation of its rail assets in order to lower operating losses and meet its debt obligations. As a consequence of this and other impediments to P&LE exiting from the rail business, P&LE's net equity value decreased by more than 100% during the 1987-1988 fiscal year. *See generally* Petitioner's Supp. Brief, App. C. (filed Nov. 22, 1988).

utilized in this case, because the parties subjected to bargaining, P&LE and its unions, will no longer have an RLA-controlled relationship. Therefore, the taking of P&LE's property furthers no legitimate purposes for which the RLA was enacted. This Court's established precedent holds that if the state deprives another person of property without a justifying public purpose, it is a taking. *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

Furthermore, even if P&LE's property was taken in order to further a legitimate RLA public purpose, this Court's decision in *Eastern Texas* demonstrates that a balance must be struck between the public purpose served and the private property interest affected. 264 U.S. at 85. Moreover, the order should have been narrowly drawn since it is a canon of statutory construction that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *IAM v. Street*, 367 U.S. 740, 749 (1961). This Court's decisions in *Eastern Texas* and *Street* require that a statute which affects constitutional rights must be construed, if possible, so as not to interfere with those rights. Thus, even if a statutory duty to bargain over effects existed, that duty must be narrowly construed and any order enforcing it must be narrowly drawn to protect P&LE's Fifth Amendment rights. The lower courts failed to do so in the instant case.

Interpretation of the RLA to prevent P&LE from going out of business deprived P&LE of its right to dispose of its property and has caused a significant erosion of the value of P&LE's property. In the circumstances of this case, the District Court's order thus constituted an impermissible

taking of P&LE's property prohibited by the Fifth Amendment.

CONCLUSION

For the reasons set forth herein, the decisions of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Railway Labor Act, 45 U.S.C. § 151, *et seq.*
Section 2, First 45 U.S.C. § 152.

§ 152. General Duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 5, 45 U.S.C. § 155

§ 155. Function of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or any emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator made by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as

provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or

subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such

records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession. (May 20, 1926, c. 347, § 5, 44 Stat. 580; June 21, 1934, c. 691, § 5, 48 Stat. 1195; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.)

Section 6, 45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.
(May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.)

Section 10, 45 U.S.C. § 160

§ 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* that no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no

change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.
(May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197.)

Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle--

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation

is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provision of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section

(1) to authorize intermodal ownership that is otherwise prohibited by this title, or

(2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

Section 10901, 49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may --

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall --

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission --

(A) finds public convenience and necessity, it may --

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the

construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 102 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys of things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in,

or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, arguing, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103 of this title.

(Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.)

Amendment V to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.